SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1957

Nos. 1046 & 1048

INTERNATIONAL SALT COMPANY,

Petitioner in No. 1046,

and

CAYUGA ROCK SALT COMPANY, CHAS. SOMAR-FER SONS, INC., WINANS CARTER CORP., WINANS RELIANCE CORP. and G. S. WINANS COMPANY,

Petitioners in No. 1048,

v.

STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
CONCLUSION	7
APPENDIX:	
A—Extract from Plaintiff's Brief in Answer to Briefs in Chief of Defendants Morton Salt Company and Diamond Crystal Salt Company, et al., Submitted on Behalf of Plaintiff in United States of America v. Morton Salt Company	1a
B—Complaint in the United States District Court for the District of Minnesota, Fourth Division	4a
C—Final Judgment in the United States District Court for the District of Minnesota, Fourth Division	13a
D—Final Judgment in the United States District Court for the District of Minnesota, Fourth Division	22a
E—Amended Final Judgment of the United States District Court for the District of Minnesota, Fourth Division	28a
F—Memorandum Decision of the United States District Court for the District of Minnesota, Fourth Division	36a
G—Findings of Fact and Conclusions of Law of the United States District Court for the District of Minnesota, Fourth Division	46a

PAGE

Cases Cited

Charles Rubenstein, Inc. v. Columbia Pictures Corp., 289 F. 2d 418 (8th Cir. 1961) 5, 6

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F. 2d 766 (3rd Cir. 1937), cert. granted, 88 S. Ct. 86 (1967) 6, 7

Hardy Salt Company v. State of Illinois, 377 F. 2d 768 (8th Cir. 1967) 6

Leh v. The General Petroleum Corp., 382 U. S. 54 (1965) 5, 6

Lyons v. Westinghouse Electric Corp., 235 F. Supp. 526 (S. D. N. Y. 1964) 7

Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U. S. 311 (1965) 5, 6

Morton Salt Company v. United States, 382 U. S. 44 (1965) 4

Simpson v. Union Oil Co., 377 U. S. 13 (1964) 6

State of Michigan v. Morton Salt Company, 259 F. Supp. 35 (D. Minn. 1966) 3fn, 6

State of New Jersey v. Morton Salt Co., 387 F. 2d 94 (3rd Cir. 1967) 6

State of Vermont v. Cayuga Rock Salt Co., 276 F. Supp. 970 (D. Me. 1967) 6

Statutes Cited

15 U.S.C. (Clayton Act):

Sec. 4B 4

Sec. 5 5

PAGE

15 U.S.C. (Clayton Act):

Sec. 5(a) 4

Sec. 5(b) 1, 4, 6

Sec. 15(b) 4

Sec. 16(b) 1, 4

15 U.S.C. (Sherman Act):

Sec. 1 2

Sec. 2 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 1345 & 1346

INTERNATIONAL SALT COMPANY,

Petitioner in No. 1345,

and

CAYUGA ROCK SALT COMPANY, CHAS. SCHAEFER SONS, INC., WINANS CARTER CORP., WINANS RELIANCE CORP. and C. G. WINANS COMPANY,

Petitioners in No. 1346,

v.

STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Questions Presented

1. Is the applicable statute of limitations in a private antitrust action suspended under Section 5(b) of the Clayton Act, 15 U.S.C. §16(b), as to all defendants during

the pendency of a civil or criminal proceeding instituted by the United States and for one year thereafter, notwithstanding the entry of a consent decree as to one defendant?

2. Is the applicable statute of limitations in a private antitrust action suspended under Section 5(b) of the Clayton Act, 15 U.S.C. §16(b), during the pendency of a civil proceeding instituted by the United States and for one year thereafter as to defendants who, though named neither as defendants nor as co-conspirators in the government proceeding, are alleged in the private antitrust case to be conspirators and participants in matters substantially identical to those involved in the government proceeding?

Statement of the Case

The petitioners are producers and distributors of rock salt in the United States and New Jersey. On July 11, 1961, Morton Salt Company, International Salt Company and Diamond Crystal Salt Company (referred to herein as Morton, International and Diamond, respectively), together with others, were named as defendants in a civil action instituted by the United States in the United States District Court for the District of Minnesota (App. B, p. 4a). That suit alleged that the defendants were engaged in a continuing combination and conspiracy to fix prices and to submit collusive bids for the sale of rock salt in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

Cayuga Rock Salt Company, Chas. Schaefer Sons, Inc., Winans Carter Corp., Winans Reliance Corp. and C. G. Winans Company, petitioners here, were not made defendants in the government action. Nor were they designated as co-conspirators. In fact, none of them conducted business in any of the midwestern states.

Contrary to the assertion made in both the present Cayuga petition and the International petition, the federal government's action against the salt companies did not confine itself to a local or midwestern conspiracy. As stated in a footnote at page 4 of the Plaintiff's Brief, filed on behalf of the United States in that action, in answer to Briefs in Chief of Defendants Morton and Diamond:

> "* * * Both the indictment and the complaint charge a nationwide conspiracy. Plaintiff limited its trial proofs of identity of bids to 17 selected geographic areas, as typical of bid patterns throughout the country. This was done in the interest of keeping cumulative evidence within reasonable bounds." (App. A, p. 1a)

Furthermore, the judgments entered against the defendants and the restraints contained therein were not restricted to any geographic area or to any one group of rock salt purchasers (App. C, D, E, pp. 13a, 22a, 28a). Finding of Facts VIII (App. G, p. 50a) of the Findings of Fact and Conclusions of Law entered in the government's civil action clearly indicates that the conspiracy involved in that case affected governmental purchasers of rock salt beyond the six-state midwestern area referred to earlier. The government, in the interests of economy and efficiency of trial administration, merely limited its proofs to evidence of purchases by seventeen (17) governmental entities in the States of Ohio, Indiana, Illinois, Michigan, Minnesota and Wisconsin[1] (App. A, p. 2a). The theory upon which

[1] The named purchasers were: State of Minnesota, City of Minneapolis, City of St. Paul, State of Wisconsin, City of Milwaukee, State of Illinois, Illinois Toll Road, City of Chicago, Chicago Transit Authority, State of Indiana, Indiana Toll Road, State of Michigan, Wayne County, City of Detroit, State of Ohio, Ohio Turnpike Commission and the City of Baltimore. The City of Baltimore was later excluded from the Court's findings of fact without explanation. See *State of Michigan* v. *Morton Salt Company*, 259 F. Supp. 35, 70-71 (D. Minn., 1966), for a discussion of the geographic area involved in the government action.

the governmental case was tried and decided was that there was a nationwide conspiracy among producers and distributors of rock salt to fix prices. Plaintiffs in this law suit have alleged that the same patterns of illegal conduct proven in the prior government action prevailed in New Jersey during the relevant periods.

In comparing this case with the prior government action, it should be kept in mind that for purposes of tolling the statute of limitations all that section 5(b) of the Clayton Act requires is that the present action be "based in whole or in part on any matter complained of" in the prior government action. The more stringent rules of collateral estoppel, applicable under section 5(a), the *prima facie* evidentiary section, are not applicable to the questions posed by these petitions.

International entered a consent decree on November 4, 1963 and thereupon terminated its participation in the government action. Judgment against defendants Morton and Diamond was entered on November 24, 1964 and were affirmed by this Court on October 26, 1965, in *Morton Salt Company* v. *United States,* 382 U. S. 44 (1965).

After initiation of the present action on June 28, 1965, the defendants, petitioners in this Court, filed answers which asserted the defense of the applicable statute of limitations, Section 4B of the Clayton Act, 15 U.S.C. §15b. Thereafter, petitioners moved for partial summary judgment based on that defense. The United States District Court for the District of New Jersey granted petitioners' motions.

Interlocutory appeals were taken to the United States Court of Appeals for the Third Circuit. On December 8, 1967, that Court rendered its opinion and entered a judgment reversing the judgments of the District Court. The

Court of Appeals held that, pursuant to Section 5(b) of the Clayton Act, 15 U.S.C. §16(b), the pendency of the government action against Morton and Diamond until October 26, 1965, effectively tolled the statute of limitations until one year thereafter as to all defendants in subsequent civil actions wherein the allegations were substantially identical to the matters alleged in the government action, regardless of whether they had been named as defendants or as co-conspirators, and regardless of when they chose to withdraw from that government action.

The Court of Appeals based its conclusions on this Court's statement of the policy underlying Section 5 of the Clayton Act as recently enunciated in *Minnesota Mining and Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965) and *Leh* v. *The General Petroleum Corp.*, 382 U. S. 54 (1965) (hereinafter referred to as *3M* and *Leh*). The Court of Appeals concluded that prior cases which seemed to support a contrary conclusion relied upon an interpretation of Section 5 of the Clayton Act which was negated by this Court's analysis in the *3M* and *Leh* decisions.

Reasons for Denying the Writ

1. As stated above, the decision of the Court of Appeals for the Third Circuit in this case was based upon certain policy considerations recently enunciated by this Court in *3M* and *Leh, supra.* The so-called conflict in the Courts of Appeals decisions to which petitioners refer exists only between decisions antedating the *3M* and *Leh* decisions and those decided subsequent to those cases. For example, the United States Court of Appeals for the Eight Circuit in the case of *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 289 F. 2d 418, 422 (8th Cir., 1961), decided prior to the *3M* and *Leh* decisions, affirmed

a District Court holding that the statute was not tolled against a defendant who was not a party to the earlier government action. The same court, after *3M* and *Leh* announced that the older cases, including its own decision in *Charles Rubenstein, supra,* were no longer controlling precedents. *Hardy Salt Company* v. *State of Illinois,* 377 F. 2d 768, 770 (8th Cir., 1967).

All opinions of the courts of this Country rendered since the *3M* and *Leh* decisions agree that the interpretation of Section 5(b) of the Clayton Act adopted before *3M* and *Leh,* is no longer correct. *State of New Jersey* v. *Morton Salt Co.,* 387 F. 2d 94 (3rd Cir., 1967); *Hardy Salt Company* v. *State of Illinois, supra; State of Vermont* v. *Cayuga Rock Salt Co.,* 276 F. Supp. 970 (D. Me., 1967); *State of Michigan* v. *Morton Salt Company,* 259 F. Supp. 35 (D. Minn., 1966).

2. The policies to be considered in applying Section 5(b) of the Clayton Act do not now require clarification. They were clearly stated in *3M* and *Leh* and since have been construed and applied uniformly in all decisions resolving the problems existing in this case. See *State of New Jersey* v. *Morton Salt Co., supra; Hardy Salt Company* v. *State of Illinois, supra; State of Michigan* v. *Morton Salt Company, supra* and *State of Vermont* v. *Cayuga Rock Salt Company, supra.*

3. The argument of petitioner International that retroactive application of a change in the law to the facts of this case would result in a denial of due process is without merit. That proposition, urged in Point 5 of the Reasons for Granting the Writ set forth in International's petition, has been applied in this field only in cases involving novel judicial statements of substantive antitrust law. *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1964); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 377

F. 2d 766 (3rd Cir., 1937), cert. granted, 88 S. Ct. 86 (1967); *Lyons* v. *Westinghouse Electric Corp.*, 235 F. Supp. 526, 536-7 (S. D. N. Y., 1964). Its justification is that parties who honestly attempt to determine the existing limits of lawful business conduct and act within such limits should not later be penalized by a retroactive application of a change in the law which they could not foresee. That is not this case. On the contrary, at the time of the modification of a rule, if any, International had already violated the substantive law of this case. Its consent to entry of the decree in the government suit was nothing more than an attempt to avoid further expensive litigation against the United States and to minimize its potential liabilities.

We note also that this argument was presented for the first time in International's Petition for Rehearing before the Court of Appeals. It was not briefed or argued on the appeal itself.

CONCLUSION

For the foregoing reasons, respondents pray that the Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit, Nos. 1345 and 1346, be denied.

Respectfully submitted,

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APPENDIX A

Extract from Plaintiff's Brief in Answer to Briefs in Chief of Defendants Morton Salt Company and Diamond Crystal Salt Company, *et al.*, Submitted on Behalf of Plaintiff in *United States of America* v. *Morton Salt Company*

Civil Action 4-61 Civ. 162 (D. Minn.)

ARGUMENT

1. *Defendants Misconceive Plaintiff's Case*

   a. Defendants Misconceive the Scope of Plaintiff's Case

Defendants, to serve their purposes, would redefine the product involved in this case, from "rock salt" to "de-icing rock salt". (D. Br. p. 42) The object would be to subtract from the consideration of this Court any evidence adduced at trial which did not direct itself specifically to de-icing rock salt.

The indictment and complaint in this matter charges a conspiracy "to fix the prices of *rock salt* to be sold to private, state and municipal purchasers." (Emphasis supplied.) Plaintiff had no authority to amend an indictment returned by a grand jury issuing mandates under its authority, and plaintiff has in no way amended or undertaken to amend the complaint in the civil case embodying the same charges as contained in the indictment.

While plaintiff concentrated its proofs at trial on the existence of the conspiracy as it manifested itself in sales of rock-salt for de-icing purposes to government authori-

ties,* it did not exclude, but on the contrary introduced evidence, as did defendants, concerning rock salt generally.

All defendants at trial utilized the processes of explaining bids by previous transactions in rock salt, without specifying whether the salt was to be used for de-icing or whatever the purposes (Tr. 1915; Tr. 2245-46, 2263-65; Tr. 2461; Tr. 3010, 3012-13; Tr. 2952-53). Diamond, in developing its theme in its brief, has no compunctions in discussing conversations with competitors in sales of rock salt to industrial customers (D. Br. p. 38). Defendants apparently would pay it "rock salt for de-icing purposes for plaintiff" and "rock salt without limitation for defendants." To advocate such a double standard in determining the relevancy of proofs, is both fanciful and presumptuous.

The truth of the matter as stated in plaintiff's brief in chief, on the basis of testimony of defendants' own witnesses, is that there is no difference in the price of rock salt based on end use. Moreover the pricing policies followed in selling the salt are the same, no matter who the purchasers are (Pl. Br. p. 5; Tr. 1682, 1683, 3012-3013). In determining whether defendants conspired to fix the prices of rock salt, therefore, there are no fine distinctions to be drawn on the basis of end use and identity of purchaser.

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* Both the indictment and the complaint charge a nationwide conspiracy. Plaintiff limited its trial proofs of identity of bids to 17 selected geographic areas, as typical of bid patterns throughout the country. This was done in the interest of keeping cumulative evidence within reasonable bounds.

b. Defendants Misconceive Plaintiff's Theory of the Case

Defendants' representations that in the prosecution of its case, "The Government's primary reliance has been on bid identity" (M. Br. pp. 20-22), are patently false. Moreover the representations are puzzling, when four pages later at page 26 of their brief, defendants attribute to counsel for plaintiff the concession that "identity standing alone does not make out a case." Plaintiff, moreover, in its brief in chief stated that it "does not suggest that mere identity of bids conclusively establishes the existence of a conspiracy." (Pl. Br. p. 14)

The fact of the matter is that identity of bids or parallel action is but one element of plaintiff's proofs. Plaintiff, in sustaining the charges, relies much more heavily on defendants' conscious adherence to a policy of "meeting and not beating", to concert of action in observing formula pricing (which plaintiff looks upon not so much as being of "unbending rigidity" [M. Br. p. 57], but as being complicated and difficult of application without collusion), to defendants' telephone calls, and meetings, and incidents of outright bid rigging. Plaintiff's case, then, by no stretch of imagination rests solely on identity of bids or parallel action.

Defendants' efforts to benefit from observations of this Court in *Parsons* v. *Paramount Film Distributing Corp.*, 215 F. Supp. 153 (D. Minn., 1963), are ill founded. In *Parsons* it was sought to draw an inference of conspiracy from *"mere parallel conduct"*. The plus factors over and above parallel conduct in the instant case, take the case completely out of the realm of "mere parallel conduct." *Parsons,* therefore, is not relevant for the proposition cited.

APPENDIX B

Complaint in the United States District Court for the District of Minnesota, Fourth Division

Civil Action
No. 461 Civ. 162

Filed July 11, 1961

UNITED STATES OF AMERICA,

Plaintiff,

v.

MORTON SALT COMPANY, INTERNATIONAL SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY, and CAREY SALT COMPANY,

Defendants.

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above named defendants and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act (15 U.S.C., Sec. 4), in order to prevent and restrain the con-

tinuing violation by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act.

2. The defendants transact business and are found within the Fourth Division of the District of Minnesota and within the jurisdiction of this Court.

II

The Defendants

3. Morton Salt Company is hereby made a defendant. It is a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago, Illinois. Said defendant produces and distributes rock salt.

4. International Salt Company is hereby made a defendant. It is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business at Clarks Summit, Pennsylvania. Said defendant produces and distributes rock salt.

5. Diamond Crystal Salt Company is hereby made a defendant. It is a corporation organized and existing under the laws of the State of Michigan with its principal place of business at St. Clair, Michigan. Said defendant produces and distributes rock salt.

6. Carey Salt Company is hereby made a defendant. It is a corporation organized and existing under the laws of the State of Kansas with its principal place of business at Hutchinson, Kansas. Said defendant produces and distributes rock salt.

7. The acts alleged in this complaint to have been done by the defendant corporations were authorized, ordered or done by the officers, agents or employees of said corporations.

Appendix B

III

Co-Conspirators

8. Two corporations engaged in the production and distribution of rock salt, not made defendants herein, participated as so-conspirators with the defendants in the offense hereinafter charged through their officers, agents and employees who performed acts and made statements in furtherance of the said offense. These producer co-conspirators are:

(a) American Salt Company, Olathe, Kansas.

(b) Barton Salt Company, Hutchinson, Kansas.

9. Various other corporations engaged only in the business of distributing rock salt, not made defendants herein, participated in the offense hereinafter charged and performed acts and made statements in furtherance of the said offense. These distributor co-conspirators are:

(a) Cutler-Magner Company, Duluth, Minnesota.

(b) Hardy Salt Company, St. Louis, Missouri.

(c) Cargill, Inc., Minneapolis, Minnesota.

IV

Definitions

10. Whenever any of the following terms shall be used in this complaint it shall have the meaning hereinafter defined:

(a) "Rock salt" means salt in a solid form existing in nature as a layer, bed or formation which is mined and pulverized into fine and coarse grades for many uses including deicing control and water softening.

Appendix B

(b) "Rock salt producer" means a person, firm or corporation engaged in the business of mining and distributing rock salt.

(c) "Rock salt distributor" means a person, firm or corporation engaged in the business of distributing rock salt which it has purchased from a rock salt producer.

(d) "Destination point" means the geographical location of the private, state or municipal purchaser of rock salt.

(e) "F.o.b. mine price" means the price of the rock salt at the mine.

(f) "Delivered price" means the price quoted to the purchaser consisting of the f.o.b. mine price of the rock salt plus transportation charges.

(g) "Deicing control" means the application of rock salt to the surface of roads and highways for purposes of removing snow and ice.

V

NATURE OF TRADE AND COMMERCE

11. The corporations named as defendants herein are the principal rock salt producers, mining and distributing approximately 75 percent of the rock salt sold in the United States. The total sales of rock salt amounted to approximately $25,000,000 for the year 1960.

12. Rock salt is mined in five major areas in the country. These areas are located in the States of Louisiana, Kansas, Michigan, Ohio and New York. Defendants also operate mines, or purchase rock salt from mines located in southern Canada. Rock salt is sold and shipped in

interstate commerce by the defendants and co-conspirators from these areas to other areas of the United States, including the State of Minnesota.

13. State and municipal agencies purchase rock salt, used primarily for deicing control, on a bid basis. A contract is awarded to the low bidder. Bidders are required by states and municipalities to quote delivered prices.

14. Rock salt is also sold and shipped in interstate commerce to most of the states in the United States, including the State of Minnesota, to private purchasers for use, among others, in meat packing and water softening processes and for agricultural processes such as salting livestock.

15. The f.o.b mine prices are published figures and are known throughout the trade. The producers in each area have the same f.o.b. mine prices as their competitors in that area. There are three f.o.b. mine prices for the five producing areas. These are the Kansas price, the Louisiana price, and the Northern price which applies to mines located in the States of Michigan, Ohio, New York and southern Canada. Truck and rail freight rates between the mines and all destination points are published by the Interstate Commerce Commission.

VI

Offense Charged

16. For many years last past, the exact date being to the plaintiff unknown, and continuing to the date of the filing of this complaint, the defendants, co-conspirators and others to the plaintiff unknown, have engaged in an unlawful combination and conspiracy to establish, maintain, stabilize and fix the prices of rock salt, in unrea-

sonable restraint of the hereinbefore described trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", c. 647, 26 Stat. 209, as amended (15 U.S.C., Sec. 1) commonly known as the Sherman Act.

17. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendant, co-conspirators and others to the plaintiff unknown, the substantial terms of which have been and are that they agree:

(a) To fix the prices of rock salt to be sold to private, state, and municipal purchasers;

(b) To quote list prices on rock salt bids to municipal and state authorities;

(c) To adhere to an industry established multiple basing point or zone pricing formula which fixes the delivered prices to each destination point in the United States;

(d) To communicate with each other for the purpose of exchanging information concerning f.o.b. mine prices, transportation charges and other information incidental to fixing delivered prices to be submitted as bids to state and municipal purchasers; and

(e) To notify competing producers in advance of any contemplated change in the f.o.b. mine prices of rock salt.

18. During the period of time covered by this complaint and for the purpose of effectuating the aforesaid combination and conspiracy, the defendants and the co-conspirators, by agreement, understanding, and concert of action, have done the things which, as hereinbefore alleged, they combined and conspired to do.

Appendix B

VII

Effects

19. The aforesaid combination and conspiracy has had the effects, among others, of:

(a) Forcing state, municipal and private purchasers to pay high, arbitrary and non-competitive prices for rock salt produced and sold by the defendants and the co-conspirators; and

(b) Resulting in identical bids for the award of contracts covering the rock salt requirements of state and municipal Governments throughout most of the states in the United States.

Prayer

Wherefore, the plaintiff prays:

1. That the Court adjudge and decree that the defendants have combined and conspired in restraint of the trade and commerce hereinabove described in violation of Section 1 of the Sherman Act.

2. That the defendants, their officers, directors, agents and employees, and all persons acting or claiming to act on behalf of the defendants be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, the combination and conspiracy to restrain the sale and distribution of rock salt as hereinbefore alleged, or any similar combination or conspiracy to restrain the trade and commerce in the sale and distribution of rock salt.

Appendix B

3. That the defendants, their officers, directors, agents and employees, be perpetually enjoined and restrained from establishing, maintaining, stabilizing and fixing the prices or other terms or conditions for the sale of rock salt to private purchasers or state or municipal authorities.

4. That the defendants, their officers, directors, agents and employees, be perpetually enjoined from using a multiple basing point or zone pricing formula to fix the delivered prices of rock salt.

5. That the defendants, their officers, directors, agents and employees, be perpetually enjoined from communicating with each other for the purpose of exchanging information concerning f.o.b. mine prices, transportation charges and other information incidental to fixing rock salt prices submitted as bids to state and municipal purchasers.

6. That the defendants, their officers, directors, agents and employees, be perpetually enjoined from notifying competing producers in advance of any contemplated change in the f.o.b. mine prices of rock salt.

7. That the plaintiff have such other and different relief as the Court may deem necessary and appropriate under the circumstances.

8. That the plaintiff recover the costs of this action.

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APPENDIX C

Final Judgment in the United States District Court for the District of Minnesota, Fourth Division

Civil Action
No. 4-61 Civ. 162

Filed: March 26, 1962

UNITED STATES OF AMERICA,

Plaintiff,

v.

MORTON SALT COMPANY, INTERNATIONAL SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY, and CAREY SALT COMPANY,

Defendants.

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendant Carey Salt Company having appeared and filed its answer to the complaint, denying the substantive allegations thereof, and the plaintiff and the defendant Carey Salt Company by their respective attorneys having severally consented to the entry of this Final Judgment without adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by either party consenting hereto with respect to any such issue:

NOW, THEREFORE, before any testimony has been taken herein, without trial or adjudication of any issue of law

or fact herein, and upon consent of the parties consenting hereto it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto, and the complaint states a claim upon which relief may be granted against the defendant Carey Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended. The making and entry of this Final Judgment shall be without prejudice to the plaintiff seeking other, further and different relief against the remaining defendants in this action.

II

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation or other legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occuring in solid form as a mineral, commonly called halite.

III

The provisions of this Final Judgment applicable to the defendant Carey Salt Company shall apply also to its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received

actual notice of this Final Judgment by personal service or otherwise.

IV

The defendant Carey Salt Company is enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Eliminate or suppress competition in the distribution or sale of rock salt;

(B) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for sales to any third person;

(C) Exchange information concerning prices, pricing methods, transportation charges or any other terms and conditions of sale at or upon which rock salt will be sold to any third person;

(D) Submit noncompetitive, collusive or rigged bids or quotations to any third person;

(E) Hinder, restrict or limit the right of any purchaser to purchase rock salt from any source; or

(F) Allocate or divide territories, markets or customers.

V

The defendant Carey Salt Company is enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

Appendix C

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI

The defendant Carey Salt Company is enjoined and restrained from directly or indirectly;

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale of rock salt;

(B) Communicating to or exchanging with any producer or distributor of rock salt any information relative to prices or transportation charges applicable to rock salt except in connection with bona fide purchase or sale negotiations or offers to sell;

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation;

(D) Selling rock salt to any reseller thereof on a commission basis.

VII

The defendant Carey Salt Company is ordered and directed for a period of three years after the date of entry of this Final Judgment, to submit a sworn statement in the form set forth in the Appendix hereto, with each bid for rock salt submitted to any governmental body, such

sworn statement to be signed by a principal officer of said defendant and by the person actually responsible for the preparation of said bid; and a duplicate of each such sworn statement and of such bid, together with the work papers used in the preparation of such bid shall be kept in the files of the defendant for a period of three years from the date of execution of such bids.

VIII

(A) Nothing in this Final Judgment shall be deemed to prevent the defendant Carey Salt Company from individually or jointly with others presenting its views to appropriate regulatory agencies with respect to transportation charges for rock salt.

(B) The relief which the plaintiff obtains against any of the remaining defendants with respect to pricing methods, including freight equalization and zone-pricing formulae shall be incorporated into this judgment without further proceedings by either party to this Final Judgment.

IX

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Carey Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence,

memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law. If any such information is divulged to a duly authorized representative of the Executive Branch, outside the Department of Justice, such information shall be given only after notice to defendant and on the condition that it will not be revealed to any person outside of such representative's Department or Agency except where required by regulation or statute or pursuant to Court process.

Jurisdiction is retained for the purpose of enabling either of the parties consenting to this Final Judgment to

apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated: March 26, 1962

EDWARD J. DEVITT
United States District Judge

We hereby consent to the making and entry of the foregoing Final Judgment:

For the Plaintiff:

_____
Assistant Attorney General

_____
JOHN W. NEVILLE

_____
MARGARET H. BRASS

_____
HERBERT F. PETERS, JR.

_____
WILLIAM D. KILGORE, JR.

_____
JEROME A. HOCHBERG
Attorneys, Department of Justice

Appendix C

For the Defendant Carey Salt Company:

LORING M. STAPLES
FAEGRE & BENSON

WILLIAM B. SWEARER
MARTINDELL, CAREY, HUNTER, DUN & BRABETS

APPENDIX

AFFIDAVIT.

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to _____ (name of recipient of bid) dated _____ has not been prepared by _____ (name of defendant) in collusion with any other seller of rock salt, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of _____ (name of defendant), to any other seller of rock salt and will not be communicated to any such seller prior to the official opening of said bid,

Appendix C

in violation of the Final Judgment in Civil No. 4-61 Civ. 162 entered by the United States District Court for the District of Minnesota on _____, 1962.

Dated: _____, 1962

_____

Signature of person responsible for the preparation of the bid

_____

Signature of person supervising the above person, where feasible

APPENDIX D

Final Judgment in the United States District Court for the District of Minnesota, Fourth Division

Civil No. 4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

—against—

MORTON SALT COMPANY, INTERNATIONAL SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY, and CAREY SALT COMPANY,

Defendants.

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendant International Salt Company having appeared and filed its answer to the complaint, denying the substantive allegations thereof, and the plaintiff and the defendant International Salt Company by their respective attorneys having severally consented to the entry of this Final Judgment without adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by either party consenting hereto with respect to any such issue;

NOW, THEREFORE, before any testimony has been taken herein, without trial or adjudication of any issue of law or fact herein, and upon the aforesaid consent of those parties it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

Appendix D

I

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto, and the complaint states a claim upon which relief may be granted against the defendant International Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended. The making and entry of this Final Judgment shall be without prejudice to the plaintiff seeking other, further and different relief against the remaining defendants in this action.

II

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation or other legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III

The provisions of this Final Judgment applicable to the defendant International Salt Company shall apply also to its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between such defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

Appendix D

IV

The defendant International Salt Company is enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for sales to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

V

The defendant International Salt Company is enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI

The defendant International Salt Company is enjoined and restrained from directly or indirectly:

Appendix D

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale of rock salt;

(B) Communicating to or exchanging with any producer or distributor of rock salt any information relative to prices, pricing methods or transportation charges applicable to rock salt except in connection with bona fide purchase or sale negotiations or published offers to sell;

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation; or

(D) Selling rock salt to any reseller thereof on a commission basis.

VII

Nothing in this Final Judgment shall be deemed to (a) prevent the defendant International Salt Company from individually or jointly with others presenting its views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendant from exercising any rights it may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defendant act in violation of any law or regulation of the United States of America.

VIII

For the purpose of securing compliance with this Final Judgment, and for such purpose only, duly authorized

representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant International Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

Appendix D

IX

Jurisdiction is retained for the purpose of enabling either of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated: November 4th, '63

GUNNAR H. NORDBYE
United States District Judge

APPENDIX E

Amended Final Judgment of the United States District Court for the District of Minnesota, Fourth Division

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY,

Defendants.

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendants Morton Salt Company and Diamond Crystal Salt Company having appeared and filed their respective answers to the complaint, and trial of this cause having been held in accordance with the stipulation assented to by attorneys for said parties signed by the Court and filed on November 4, 1963, and the Court having on August 6, 1964, issued a Memorandum Decision directing the submission of a decree in accordance therewith and the Court having filed its Findings of Fact and Conclusions of Law on November 24, 1964, and the Court having filed its order amending the Final Judgment on February 19, 1965,

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

Appendix E

I

This Court has jurisdiction of the subject matter hereof and of said parties hereto. The complaint states a claim upon which relief may be granted against the defendants Morton Salt Company and Diamond Crystal Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and defendants Morton Salt Company and Diamond Crystal Salt Company have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

II

As used in this Amended Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation, or legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III

The provisions of this Amended Final Judgment applicable to the defendants Morton Salt Company and Diamond Crystal Salt Company shall also apply to their respective subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendants who shall have received actual notice of this Amended Final Judgment by personal service or otherwise, but shall not

apply to transactions solely between a defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

IV

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for any sale to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

V

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

Appendix E

VI

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale for rock salt;

(B) Communicating to or exchanging with any person any information relative to prices, pricing methods or transportation charges applicable to rock salt, except with

(1) prospective purchasers in connection with bona fide purchases or sale negotiations or published offers to sell;

(2) carriers in connection with bona fide shipments; and

(3) warehousemen in connection with bona fide storage arrangement.

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

(D) Selling rock salt to any reseller thereof on a commission basis.

VII

The defendants Morton Salt Company and Diamond Crystal Salt Company are each directed and ordered for a period of three years after the date of the entry of

this Amended Final Judgment to prepare monthly a sworn statement in the form set forth in the Appendix hereto attached in which it shall list each bid for rock salt submitted by it to a governmental body during the next preceding calendar month. These sworn statements are to be submitted to the Department of Justice of the United States by such defendant on or before the last date of each calendar month during the three-year period commencing March 31, 1965. A duplicate of the sworn statement as to the bids listed thereon, together with the work papers used in the preparation of such bid shall be kept in the files of the defendant for a period of three years from the date of the execution of such bids.

VIII

Nothing in this Amended Final Judgment shall be deemed to (a) prevent the defendants Morton Salt Company and Diamond Crystal Salt Company from individually or jointly with others presenting their views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendants from exercising any rights they may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defendants act in violation of any law or regulation of the United States of America, or (d) prevent such defendants, or any of their respective subsidiaries, successors, assigns, officers, directors, agents, or employees, from participating in any *bona fide* distributorship or brokerage dealings or transactions not illegal under any of the antitrust laws of the United States.

Appendix E

IX

For the purpose of securing compliance with this Amended Final Judgment duly authorized representatives at the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Morton Salt Company or defendant Diamond Crystal Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; and

(B) Subject to the reasonable convenience of said defendant and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendants shall submit such written reports with respect to any of the matters contained in this Amended Final Judgment as from time to time may be necessary for the purpose of enforcement of this Amended Final Judgment.

X

No information obtained by the means permitted in this Section shall be divulged by any representative of the De-

partment of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Amended Final Judgment in which the United States is a party or as otherwise required by law.

XI

Jurisdiction is retained for the purpose of enabling any of the parties to this Amended Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Amended Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

XII

The defendants Morton Salt Company and Diamond Crystal Salt Company are hereby ordered to pay all costs to be taxed in this case.

Exceptions to this judgment are reserved.

Dated this 19th day of February, 1965.

By the Court:

Gunnar H. Nordbye
Judge

Appendix E

APPENDIX

Affidavit

The undersigned, a principal officer of _____ (name of defendant), being first duly sworn, certifies to his best knowledge and belief that:

(1) Listed herein under Paragraph (2) hereof are all of the bids for the sale of rock salt submitted by _____ (name of defendant) to any governmental body during _____ (month and year) and that none of the bids listed were prepared by _____ (name of defendant) in collusion with any other seller of rock salt.

(2) List of bids, the name of recipient, and the date submitted during _____ (month and year):

_____

_____

_____

(3) The prices, terms or conditions of said bids were not submitted or made known by _____ (name of defendant) or by any employee or agent of _____ (name of defendant) to any other seller of rock salt prior to the official opening of said bids in violation of the Final Judgment in Court Action No. 4-61 Civil 162 entered by the United States District Court for the District of Minnesota, as amended on February 19, 1965.

_____

(Name of defendant)

By _____

Subscribed and sworn to before me this_____ day of _____, 196—.

_____

Notary Public
(State and County)

APPENDIX F

Memorandum Decision of the United States District Court for the District of Minnesota, Fourth Division

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY,

Defendants.

This cause comes before the Court on a stipulation filed November 4, 1963, whereby the issues herein are submitted on the record in a criminal proceeding between the same parties.

Mr. John W. Neville, Mr. Jerome A. Hochberg, and Mr. Robert J. Rotatori, Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the plaintiff;

and

Mr. L. M. McBride and Mr. John P. Ryan, Jr., Chicago, Illinois (Messrs. McBride, Baker, Wienke & Schlosser, Chicago, Illinois, and Mr. John G. Robertson and Messrs. Oppenheimer, Hodgson, Brown, Wolff & Leach, St. Paul, Minnesota, of counsel) in behalf of defendant Morton Salt Com-

pany; Messrs. Bowen, Bowen, Preus, Farrell & Adams, Minneapolis, Minnesota, and Messrs. Dickinson, Wright, McKean & Cudlip, Detroit, Michigan, in behalf of defendant Diamond Crystal Salt Company.

Defendants are charged with violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, the pertinent portion of which reads:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restrain of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

The complaint alleges a conspiracy to fix the prices of rock salt. The issues herein are limited to sales to public authorities under sealed bids. The defendants in this civil proceeding are Morton Salt Company and Diamond Crystal Salt Company. Originally, Carey Salt Company and International Salt Company were parties, but consent decrees have been entered as to them. The co-conspirators not named as parties herein with which the evidence is concerned primarily are Cutler-Magner Company, of Duluth, Minnesota, a distributor for Morton Salt Company, and Cargill Corporation, of Minneapolis, Minnesota, a distributor for Diamond Crystal Salt Company. The governmental agencies concerned are located in the States of Minnesota, Wisconsin, Michigan, Illinois, Ohio and Indiana. In these areas, the parties share some 85 to 95 per cent of the rock salt business. The annual sales to governmental agencies are admittedly substantial.

It is the plaintiff's contention that the record herein amply substantiates a finding that, during the period from

1956 to 1960, these defendants, with others involved acting in concert, adopted a policy of restrictive pricing of rock salt to the end that separate bidding on this commodity to be furnished to the various governmental agencies in the area involved should produce identical prices. This plan, according to the plaintiff, was carried out primarily by a so-called formula price fixing; that is, the defendants maintained arbitrary f.o.b. mine prices which bore no relation to their costs of production, overhead, or anticipated profits; that a method or plan was devised by the conspirators whereby each of the defendants, according to a pre-arranged plan or understanding in preparing bids to a particular governmental agency, would first determine in order to meet the competitive price of the other competitors, the latter's f.o.b. prices. The f.o.b. prices were maintained, according to the plaintiff, at a high enough level to protect the pricing policy of the defendant suppliers, and directed to constitute a means whereby each of the rock salt suppliers in the industry would be better enabled to meet the bidding price of any particular supplier. In addition, plaintiff contends that a defendant bidder would in most instances include the rail freight rates of its competitor or competitors even though the shipment was to be made by water or by truck, knowing that to be the method which would be employed by its competitors in determining their bidding prices. In other words, plaintiff contends that if A is to bid against B, A will attempt to frame its bid on B's f.o.b. mine price and freight rates, whether artificial or not, in attempting to compute a competitor's delivered price, and with the designed purpose of meeting, that is, to match, and not beat, the bidding price of its competitor or competitors. Plaintiff recognizes that,

in addition, there is a practice among the defendants to obtain post-bidding information of their competitors. These practices, however, according to plaintiff, are all designed to carry out an understanding as to uniform bid prices among the suppliers of rock salt even though their purpose and intent may not always be attained. In other words, plaintiff contends that there was a concerted plan among the defendants to meet the price of all competition in all bidding so far as that plan could be accomplished. Plaintiff contends that its position as to the plan and practice followed by the industry in this regard is not only directly sustained by the evidence, including the meetings of the parties with each other to achieve this end, but that the record reflects what it terms a monotonous identity of the bids among the defendants. For instance, plaintiff points out that to the State of Minnesota in 1956, Morton, Cutler-Magner and International bid identically on some 67 locations. In 1957, to this State, the same bidders were identical in 57 locations. In 1958, to Minnesota, Cutler-Magner, International and Cargill were identical at 68 out of 69 delivered locations, and on a re-bid they were identical 53 times. In 1959, Cutler-Magner, International and Cargill participated in four separate invitations to bid to Minnesota, and on some 273 occasions the bids were from 95 to 100 per cent identical. In 1960, to the same State, Cutler-Magner, International and Cargill were identical on 135 different bids involving truck and railroad bag deliveries, and on some 41 bids during that year, Cutler-Magner and Cargill were identical 90 per cent of the time. And to the City of Minneapolis during a period from 1957 to 1960, the Morton or Cutler-Magner or Cargill bids with International 47 times on bulk truck, bulk pick-up, bag truck or bag pick-up bids were identical. Diamond, how-

ever, submitted no bids to Minnesota municipalities during the period in question.

The record of Morton and International with Cutler or Cargill in bids to the State of Wisconsin in 1956, 1957, 1958 and 1959 reflects a percentage of identical bidding which varies from 94 to 100 per cent. In bids to the City of Milwaukee, Wisconsin, Morton and International were identical from 1956 to 1960. A similar record as to Morton and International were reflected in bidding to the City of Detroit, Michigan, the State of Ohio and the State of Ohio Turnpike Commission. Diamond, however, in 1958 as to Wisconsin area destinations was non-identical in 41 out of 62 bids, and in 1959 there was non-identical in 41 out of 62 bids, and in 1959 there was non-identity in 52 out of 72 of its Wisconsin bids, and on re-bid for that year Diamon was completely non-identical. In 1960 Diamond's bid to the State of Wisconsin was 94.4 per cent identical in 67 out of 71 bids, and 100 per cent identical in four bids with Morton and International to the City of Milwaukee. However, in 1960, as to Wayne County Road Commission of Michigan, Diamond was 100 per cent in identity as a bidder in some 17 bids with Morton and International. As to Illinois bidding in the year 1957, Diamond, International and Cargill out of 11 bids, were identical in 165, or 91.2 per cent, and in 1959, in bag railroad and bulk railroad, Morton, Diamond and International in some 45 bids were 100 per cent identical, and in 1960, 90 per cent identical. These Illinois bids were made to the State of Illinois Highway Division. In bids to the State of Illinois Toll Road Commission, Diaimond, Morton, International and Cargill were 100 per cent identical in the year 1960 in some 16 bids. In Ohio in the years 1958 to 1960 Diamond's record as to

identity of bids carried from 94.3 to 100 per cent in identity.*

The position of the defendants may be summarized as follows: Rock salt is a homogenous substance which for the purpose of de-icing is of the same quality regardless of the producer. It is bought strictly on the basis of price. According to the defendants, business experience has fully established the necessity of attempting to have uniformity in bids made to governmental agencies. Uniformity in bidding is therefore attempted to be attained by an examination of prior bids of competitors and an independent analysis is made by each of the defendants in framing bids in an attempt to meet the bids of competitors so as to avoid the debacle in the rock salt market if price cutting were entered upon. Thus, it is argued that, although there is an individual attempt to attain uniformity in the bids made to the various governmental agencies, this attempted result is not due to any concert of action or understanding among the defendants but represents the individual exercise of common business prudence. According to the defendants, the identity of bids which the Government stresses as evidence of conspiracy to fix prices is due to four principal factors: (1) The factor growing into the make-up of most bids, i.e., the f.o.b. mine price and the common knowledge of freight rates; (2) prior bids of competitors to any governmental agencies in any State are made known and made use of in framing the next year's bids by competitive bidders; (3) additional competitive information is attained

* The above recited statistical data as to the results of bidding do not assume to include a summary of the entire record with respect thereto, but it is fairly representative and the percentages quoted are substantially correct.

by each of the defendants obtaining public data disclosed at the opening of bids; and (4) the number of major companies producing rock sale is sufficiently small so that the bidding practices may be analyzed and followed by the others. Thus, it is urged by the defendants that the Government's attempt to deduce collaboration from mere identity of bids is completely frustrated by the record herein. It is the position of the defendants that the identity of bids stems from the attempt to adopt and match bids of competitors with the defendants acting individually in the best interests of their companies. Each of the defendants points out that the mere individual following of a competitor's announced price is not illegal even if it is carried out with the intent of achieving identical prices. Self-interest, it is argued, dominates the interest of each defendant in its individual attempt to match a competitive price and not a conspiracy or understanding among the defendants, as the Government charges. In addition, the defendants argue that the express denials of collusion by the officials of the defendants fully negatives the assumption which the Government assumes to deduce from parallelism in prices. And the defendants vigorously emphasize the evidence of aggressive competition among the defendants, at least at certain periods during the existence of the alleged conspiracy.

At the outset, it must be recognized that identical bids do not necessarily indicate that they emanate from collusion or conspiracy on the part of the defendants to fix prices. Moreover, ruinous competition among the producers of rock salt may well spell disaster to the entire industry. On the other hand, if there is a conspiracy to fix prices in violation of the law, defendants may not justify their action by the contention or defense that they were motivated to enter into it in order to avoid ruinous com-

petition. It is difficult to analyze this entire record as to collaboration among the parties and with the multitude of complete identities in the bids to the very penny without concluding that this anomalous result was obtained in no other manner than by an adherence to a plan adopted by consultation and conferences among the parties involved. That the plan did not at all times prove effective and that there were sporadic departures therefrom is readily apparent. But equally so are the incidents as to conferences in meetings, by telephone, and otherwise, which were carried on by the parties in order to restore the understanding among the parties.

In finding that the plaintiff has established by a fair preponderance of the evidence that there was an agreement among these defendants to meet the bid prices of the various rock salt bidders who filed written bids with governmental agencies during the period in question and in the geographical area referred to, the Court is entirely mindful that at times when it seemed to suit their purpose, these companies have taken independent action by way of bid prices. Moreover, Morton Salt Company obtained a controlling interest in certain Canadian companies in order to compete with International, which resulted in a marked increase in the business of Morton and to the detriment of the business of International. There is evidence that during the period covered by the complaint, not only was Diamond merely partly successful in meeting bid prices of its competitors, but that it adopted new techniques in the distribution of rock salt whereby Diamond and its distributor, Cargill, markedly increased their sales to the dimunition of sales by some of the other defendant competitors. Admittedly, these circumstances may seem inconsistent with the position of the Government with ref-

erence to the alleged understanding to avoid competition in the bid prices of rock salt. But, on the other hand, it is not the position of the plaintiff that the understanding and plans of the parties at all times operated with complete efficiency. The defendants agree that they did attempt *individually* to meet the bid price of other competitors in order to avoid a spiral of prices downward which allegedly would have been ruinous to the industry. The fact that there were, during the period in question, instances of aggressive competition and strategy in attempting to build up the individual business position by one or more of the defendants does not negative the affirmative evidence that during the period in question there was in effect among the defendants a concerted plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the governmental agencies in the areas involved. Price fixing practices by a concert of action which are condemned by the law are not freed from the law's impact merely because the plan at times broke down by the competitive acts of the so-called mavericks in the industry, or that there was not uniformity at all times in the carrying out of the plan. Moreover, even legitimate sources of information as to previous bids or computation of bids to meet a competitor's bid which are made on factors well known to all in the industry, if gathered and obtained in pursuance of a plan and understanding between and among the parties that the prices of rock salt should be uniform, may be considered as activities in furtherance of an illegal conspiracy.

In making the foregoing observations, this Court has fully recognized the principle that defendants emphasize,

to with, that an agreement is a *sine qua non* of a price conspiracy and that the language of the Supreme Court in *Theatre Enterprises* v. *Paramount Film Dist. Corp.*, 346 U. S. 537 (1954), at pp. 540-41, is particularly pertinent here:

> "* * * To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. * * * But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

However, we do not only have circumstantial evidence of consciously parallel behavior, but sufficient additional facts and circumstances which amply justify the Court in concluding that by the greater weight of all the evidence the plaintiff has sustained the burden of proof which the law imposes upon it.

Plaintiff may, on September 14, 1964, at ten o'clock A.M., upon appropriate notice, present proposed findings of fact and conclusions of law and order for judgment consistent herewith. Exceptions will be reserved to the defendants.

Dated this 6th day of August, 1964.

By the Court:

GUNNAR H. NORDBYE
Judge

APPENDIX G

Findings of Fact and Conclusions of Law of the United States District Court for the District of Minnesota, Fourth Division

4-61 Civ. 162

(Filed—November 24, 1964.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY,

Defendants.

The complaint in this case, which was filed on July 11, 1961, alleges a conspiracy to fix the prices of rock salt. Except for the prayer for relief and other appropriate charges in form therein, the complaint is identical to an indictment filed June 28, 1961, in Criminal Action No. 4-61 Cr. 65, against Morton Salt Company ("Morton"), International Salt Company ("International"), Diamond Crystal Salt Company ("Diamond"), and Carey Salt Company ("Carey"). Prior to the trial of said criminal action, Carey pleaded *nolo contendere* and concurrently therewith a consent judgment was entered against Carey in this civil case. On June 7, 1962, after a trial which commenced on May 2, 1962, Morton, International and Diamond were acquitted of the charge set forth in the indictment by the jury impaneled in said criminal action. On November 4,

1963, a consent judgment was entered against International in this case. Pursuant to a "Stipulation Re Trial of Case on Record," filed November 4, 1963, plaintiff, Morton and Diamond agreed that this case be tried on the record made in said criminal action, as supplemented by plaintiff's interrogatories 1 and 2 filed in this case, Morton's answers thereto, and Diamond's answers thereto, as amended. The initial briefs of the plaintiff and of each defendant were concurrently filed on or about December 2, 1963, and their responsive briefs were concurrently filed on or about December 23, 1963. This Court's Memorandum Decision was filed on August 6, 1964.

Mr. John W. Neville and Mr. Jerome A. Hochberg, Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the plaintiff;

Mr. L. M. McBride and Mr. John P. Ryan, Jr., of Messrs. McBride, Baker, Wienke & Schlosser, Chicago, Illinois, and Mr. John G. Robertson, of Messrs. Oppenheimer, Hodgson, Brown, Wolff & Leach, St. Paul, Minnesota, in behalf of defendant Morton Salt Company;

Mr. Fred W. Freeman and Mr. George B. Martin, of Messrs. Dickinson, Wright, McKean, & Cudlip, Detroit, Michigan, and Mr. Robert E. Bowen, of Messrs. Bowen, Bowen, Preus & Farrell, Minneapolis, Minnesota, in behalf of defendant Diamond Crystal Salt Company.

Findings of Fact

I

The following Findings of Facts are limited to sales of de-icing rock salt by Morton from 1956 to 1960, by Dia-

mond from 1957 to 1960, and by other co-conspirators during that period, made under sealed bids submitted to one or more of the following government agencies: State of Minnesota, City of Minneapolis, City of St. Paul, State of Wisconsin, City of Milwaukee, State of Illinois, Illinois Toll Road, City of Chicago, Chicago Transit Authority, State of Indiana, Indiana Toll Road, State of Michigan, Wayne County, City of Detroit, State of Ohio and Ohio Turnpike.

II

Rock salt is the term applied to solid sodium chloride and its impurities as it is found in nature. It is mined in five principal sections of the United States, namely Louisiana, Kansas, Michigan, Ohio and New York. Defendants ship rock salt in interstate commerce.

The location of the mines which were the principal sources of rock salt sold to government agencies in the Six-State Midwest Area during all or part of the years 1956-60 are as follows:

Detroit, Michigan—International

Ojibway, Ontario, Canada—Morton

Fairport, Ohio—Morton

Jefferson Island, Louisiana—Diamond

Goderich, Ontario, Canada—Sifto Salt Limited, from which Diamond purchased rock salt for resale in the United States during 1960

Hutchinson, Kansas—Carey

Kanapolis, Kansas—Independent Salt Company

Lyons, Kansas—American Salt Company

Appendix G

Until January, 1957, Diamond did not produce rock salt and did not sell rock salt to government agencies. At that time it acquired Jefferson Island Salt Company whose only rock salt mine is located at Jefferson Island, Louisiana.

III

International, Morton and Diamond among them share 85-90% of the rock salt market nationwide. This degree of control is present specifically in the Six-State Midwest Area, i.e., Minnesota, Wisconsin, Michigan, Illinois, Ohio, and Indiana, the subject of concentrated proof at trial.

IV

Defendants, with co-conspirators, in concert, adopted a policy of restrictive pricing of rock salt to the end that bidding on this commodity to be furnished to the various governmental agencies with which the conspirators did business should produce identical prices. The policy, in application, consisted simply and avowedly of not competing on prices, or otherwise stated, "meeting but not beating the price of a competitor."

V

The policy was carried out in the main by a system of formula pricing consciously adhered to by the conspirators, relying primarily on the following:

(a) The conspirators, by concert of action, would use the same f.o.b. mine prices in computing delivered prices.

(b) The f.o.b. mine prices so used bore no relation to the conspirators' costs of production, overhead, or anticipated profits, but were maintained at a high enough level to protect the pricing policy and better enable the conspirators to meet one another's prices.

Appendix G

(c) The conspirators, by concert of action, would use artificial freight rates in computing delivered prices.

VI

Concert of action among the conspirators was achieved by the conspirators maintaining among themselves a system of intelligence, the specific purpose of which was to assure adherence to formula and arrive at identical prices to public authorities.

VII

The system of intelligence was maintained by telephone calls and by meetings held periodically among the conspirators. The calls and meetings were among officers of the conspirators at the higher echelons. Meetings took place in Minnesota, Illinois, Michigan and elsewhere.

VIII

The effect of the conspiracy on public authorities was to cause bids to said public authorities for de-icing salt, including the sixteen mentioned specifically in the Government's proofs as indicative of bids made by the conspirators to public authorities generally, to be identical to a substantial and in many instances to an extraordinary degree, thereby depriving said public authorities of the advantage of competitive bidding.

IX

Plaintiff has sustained its burden of proof not only by evidence of consciously parallel behavior but also by abundant positive evidence of outright collaboration establishing the existence of agreement and understanding among the parties.

Appendix G

X

The fact that there were instances of aggressive competition and strategy in attempting to build up the individual business position by one or more of the defendants, or the fact that there were breakdowns or interruptions in the uniformity of price patterns caused by so-called "mavericks" or otherwise, does not negative the preponderantly affirmative evidence established by the record as a whole that there was in effect among the conspirators a concerted and continuing plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the government agencies with which the conspirators did business.

Upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The defendants are and have been engaged in trade and commerce among the several States in the sale of rock salt. The Court has jurisdiction of the parties and the cause of action herein.

2. The defendants Morton Salt Company and the Diamond Crystal Salt Company have combined and conspired to fix prices in the sale of rock salt in violation of Section 1 of the Sherman Act as charged in the complaint.

3. A final judgment consistent herewith will be entered.

Exceptions are reserved.

Dated this 24th day of November, 1964.

BY THE COURT:

GUNNAR H. NORBYE
Judge.